Supreme Court, U.S.
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No. 06-839

IN THE

Supreme Court of the United States

LOUISIANA HEALTH SERVICE & INDEMNITY CO., doing business as Blue Cross and Blue Shield of Louisiana,
Petitioner,

v.

RAPIDES HEALTHCARE SYSTEM; STATE OF LOUISIANA; CHARLES R. FOTI, JR., Attorney General for the State of Louisiana; DAUTERIVE HOSPITAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The Fifth Circuit's decision that ERISA does not preempt the Assignment Statute creates a clear conflict with decisions of this Court and other circuits. The decision validates a state law that is contrary to lawful plan terms, conflicts with ERISA's exclusive civil enforcement mechanism, and interferes with the attainment of a national, uniform administrative scheme. Blue Cross asks this Court to review a decision that neglects fundamental ERISA tenets and contravenes Congressional intent.

ERISA expressly reserves control over the structure of ERISA plans to the plan sponsor, allowing it to designate, in the plan, *to whom* and how a plan administrator should pay ERISA plan benefits. ERISA obligates a plan administrator to act in accordance with such lawful plan terms, including terms that prohibit direct payment of benefits to anyone other than the plan participant or a network provider. And ERISA permits claims pursuant to those provisions to be enforced only under ERISA's exclusive civil enforcement scheme.[1] The Assignment Statute must be preempted by ERISA because it conflicts with those clearly expressed Congressional goals. Respondents' assertion that the Assignment Statute is consistent with the goals of ERISA because it facilitates participants' receipt of benefits underscores the fact that the statute indeed "relates to" ERISA plans.

Respondents detract attention from preemption principles by casting Blue Cross as a bullying insurance company, "brandishing a threat" (Opp. 1), "wielding a club" (Opp. 13), and "coercing providers" (Opp. 1), and asserting that provider or participant interests surpass all others.

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[1] ERISA Sections 402(b)(4), 404(a)(1)(D), 3(8), and 502(a)(1)(B), 29 U.S.C. §§ 1102(b)(4), 1104(a)(1)(D), 1002(8), and 1132(a)(1)(B), respectively.

Respondents' harsh tactics cannot overcome statutory language that demands a finding of preemption here. *See, e.g., Mertens v. Hewitt Associates,* 508 U.S. 248, 261 (1993) (vague notions of statute's purpose are inadequate to overcome words of its text regarding specific issue under consideration, especially regarding ERISA, "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs.").[2]

A. The Fifth Circuit decision conflicts directly with decisions of other circuits

The Fifth Circuit acknowledged expressly that its decision conflicts with analogous decisions by both the Eighth and Tenth Circuits.[3] Respondents argue that the Fifth Circuit erred in this assessment,[4] and resolution of the conflict would be premature, because the circuit split is "ephemeral" and "obsolete," and the conflicting decisions "antiquated." (Opp. 21-24.)

First, Respondents direct this Court to impose a new standard in determining whether a circuit split exists by asking how the lower courts "would decide *this* case,

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[2] Confounding logic, Respondents argue that ERISA preemption of the Assignment Statute would "inflict[] a deadweight loss on the entire health care system" (Opp. 1), while at the same time asserting that this case does not present any "issue of practical import to the health care community." (Opp. 9). Petitioners submit it is also disingenuous for Respondents to assert that this Court's prior decisions "provide a straightforward framework" for preemption analysis (Opp. 30), when Justices repeatedly bemoan the lack of clarity (Pet. 13 n.13).

[3] Pet. App. 18a.

[4] Consistent with their approval of and reliance upon only selected portions of the Fifth Circuit's opinion, Respondents also assert that plan language requires Blue Cross "to respect assignments 'as required by law,' " attempting to revive an argument that the Fifth Circuit explicitly rejected. Pet. App. 7a ("ERISA plans must always conform to state law, but only state law that is valid and not preempted by ERISA.")

today..."? (Opp. 21.) Respondents are incorrect. To be considered a conflict worthy of resolution, a circuit split need not be among contemporaneous decisions. *See, e.g., Empire HealthChoice Assur., Inc. v. McVeigh*, 126 S. Ct. 2121 (2006) (granting *certiorari* to resolve conflict among decisions issued between 1993 and 2005); *Geissal v. Moore Med. Corp.*, 524 U.S. 74 (1998) (granting *certiorari* to resolve conflict among decisions issued between 1989 and 1998); *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961) (conflicting opinion rendered 22 years earlier); *Commissioner v. Stidger*, 386 U.S. 287, 289 (1967) (conflicting opinion rendered 18 years earlier).

Respondents next argue the Eighth and Tenth Circuits' decisions do not truly conflict with the Fifth Circuit's decision because the earlier opinions relied on an analysis rendered "plainly untenable" by *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). (Opp. 22.) Respondents' tortured attempts to distinguish the lower court decisions are unavailing. This Court in *Travelers* reaffirmed the applicability of the factors relied upon in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992), and *St. Francis Regional Medical Ctr. v. Blue Cross & Blue Shield*, 49 F.3d 1460 (10th Cir. 1995) (*see* Pet. 19-20), and the lower courts continue to rely on those factors in decisions issued after *Travelers*.

Respondents assert that "there is no reason to believe" the Eighth Circuit would adhere to its holding after *Travelers* (Opp. 23). Respondents are wrong. *See, e.g., Minn. Chptr. of Assoc. Builders & Contrs., Inc. v. Minn. Dep't of Pub. Safety*, 267 F.3d 807, 814-818 (8th Cir. 2001) (statute preempted because rather than merely encourage or provide economic incentives for compliance, the statute "absolutely demand[s] it," and has connection with ERISA based on the factors considered in *St. Mary's*, citing

Dillingham[5]), *cert. denied*, 535 U.S. 1096 (2002).[6]

Respondents next address the conflicting lower courts' failure to begin their analysis with a "presumption against preemption …in cases involving 'traditional state powers.'" (Opp. 22.) Whether or not the Assignment Statute addresses a historic police power, decisions after *Travelers* have overcome "the starting presumption that Congress does not intend to supplant state law,"[7] in cases where, as here, the state law affects ERISA plan administration. In *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001) decided six years after *Travelers*, the Supreme Court held ERISA preempted a statute relating to family and probate law – concededly areas of traditional state regulation – because the presumption against preemption can be overcome when the state law conflicts with ERISA or relates to ERISA plans, citing *Boggs v. Boggs*, 520 U.S. 833 (1997) (ERISA preempts state community property law). 532 U.S. at 151. The state law at issue in *Egelhoff* functioned in the same manner as the

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[5] *California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997).

[6] *See also Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 908 (8th Cir. 2005) ("*Prudential II*") (approving the "significant" express preemption analysis it had conducted in *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 154 F.3d 812 (8th Cir. 1998) ("*Prudential I*")). In *Prudential I*, the Eighth Circuit explicitly considered the impact of *Travelers*, 154 F.3d at 820-822, and stated, *inter alia*, "[W]e do not read *Travelers* to reject all of its prior precedent on the scope of ERISA preemption or as a wholesale rejection of the mode of analysis employed in the Court's prior precedent," 154 F.3d at 820. *Prudential I* concluded that the statute was expressly preempted as a law that makes impermissible "reference to" ERISA or ERISA plans. The court found it unnecessary to reach the question of whether the statue was also preempted under the "connection with" prong of the preemption analysis. *Id.*, at 825.

[7] *Travelers,* 514 U.S. at 655.

Assignment Statute: it dictated a benefit choice at odds with lawful plan language. *See also Dillingham,* 519 U.S. at 330 ("That the States traditionally regulated these areas would not alone immunize their efforts; ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation."); *Retail Industry Leaders Assoc. v. Fielder*, 475 F.3d 180, 183, 193 (4th Cir. 2007) (state statute preempted because it effectively requires employers to restructure employee health insurance plans, *i.e.*, "has an impermissible 'connection with' ERISA plan [because] it directly regulates or effectively mandates some element of the structure or administration of employers' ERISA plans"); *Bank of La. v. Aetna US Healthcare Inc.*, 468 F.3d 237, 242 (5th Cir. 2006) (ERISA preempts state law claim alleging improper processing and payment of benefit claims because it requires inquiry into area of exclusive federal concern); *Travelers,* 514 U.S. at 658 (state law preempted if it mandates employee benefit plan structure or its administration).

Next, Respondents argue that the economic impact of the Assignment Statute, to the extent it eliminates an incentive for providers to join the Blue Cross network, is no longer relevant to the preemption analysis. Respondents' citation of *Dillingham* and reliance on the *Travelers* trilogy to support this notion is incorrect. In *Dillingham,* this Court distinguished a statute that merely altered incentives to a plan, from a statute that "dictates the choices, facing ERISA plans." 519 U.S. at 334. With respect to the latter, *i.e.,* a statute that "is tantamount to a compulsion," preemption is the proper result; *id.* at 333. In contrast, a statute that "does not bind ERISA plans to anything," *id.* at 332, need not be preempted. The Assignment Statute purports to compel all ERISA plans to recognize assignments to all providers, thus binding the ERISA plan, and dictating its choices, with respect to plan administration. Under the reasoning of

Dillingham, the Assignment Statute is preempted because the state demands plan compliance with its requirements.[8]

B. The Assignment Statute relates to ERISA

ERISA Section 514(a), 29 U.S.C. § 1144(a), mandates preemption of the Assignment Statute because it requires plan administrators to pay benefits in a particular manner, in contravention of lawful plan terms, and thus relates to ERISA. (Pet. 13-16.)

Respondents argue that the Assignment Statute does not relate to ERISA because ERISA does not expressly bar assignments of welfare benefits. Citing *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), Respondents assert Congressional silence evidences an intent to allow enforcement of assignment laws against ERISA plans. This argument is unpersuasive. In *Mackey*, this Court held ERISA did not preempt a *garnishment* statute that permitted the state to enforce a judgment *unrelated to the provision of ERISA benefits* against an ERISA plan. Neither the garnishment statute nor enforcement of a garnishment order would require the elimination of a lawful ERISA plan term.

In contrast, the Assignment Statute must be preempted because it purports to regulate a primary ERISA function – a plan's payment of plan benefits in accordance with ERISA plan terms – and purports to mandate the manner of payment in conflict with lawful plan provisions. Alienation of benefits by a third party via garnishment is distinguishable on this basis from participant assignments to providers, because an ERISA

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[8] The decisions relied upon by Respondents correctly recognize the distinction they overlook; *see Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1031 (8th Cir. 2003) (noting correctness under *Dillingham* of ruling that ERISA preempts a state law that dictates the choices facing ERISA plans and mandates compliance with numerous requirements); *Willmar Elec. Serv. v. Cooke*, 212 F.3d 533, 537 (10th Cir. 2000) (discussing *Dillingham* analysis that statute's provision of economic incentive to comport with state's requirements does not bind ERISA plans to anything, and thus statute need not be preempted).

plan provision cannot govern creditor rights. *St. Mary's,* 947 F.2d at 1349; *see also Davidowitz v. Delta Dental Plan, Inc.*, 946 F.2d 1476, 1479 (9th Cir. 1991) (garnishment cases "cannot be stretched" to mean that "beneficiaries can freely assign notwithstanding a plan's non-assignment clause. They simply hold that state law may provide a statutory mechanism for judgment collection.").

Respondents misread *Egelhoff* as holding that ERISA preempts only state laws that "supplant[] the free will of the ERISA plan participant."[9] (Opp. 14). To the contrary, *Egelhoff* held a statute preempted because it contravened lawful plan terms that permitted a participant to designate a beneficiary,[10] not because it interfered with a participant's "free will." The Assignment Statute must be preempted because it supplants lawful plan terms regarding to whom benefit payments may be made. The plan sponsor's right to designate permissible beneficiaries, and the plan administrator's obligation to enforce such provisions, are acts regulated and protected by ERISA. To the extent a participant purports to designate a beneficiary that contravenes the plan terms, such designation is not enforceable.[11]

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[9] Characterization of the participant's assignment to the provider as an act of "free will" deserving of protection is questionable when one considers what really occurs in the context of a patient's admission to a hospital: a clerk presents a form for signature to the patient which, among other things, requires the participant to check a box that states he assigns his right to benefits to the hospital.

[10] 532 U.S. at 147.

[11] Respondents mischaracterize the ERISA definition of "beneficiary" and assert Petitioner's "reading" of the definition is "overly technical." Opp. 14. In fact, the statute's definition is plain and requires no "reading." A beneficiary is a person designated by a participant or by the plan terms, ERISA Section 3(8), but must be entitled to benefits under the plan terms. It is insufficient for a beneficiary to assert entitlement based on the participant's designation, if the plan terms prohibit payment

Finally, Respondents ask this Court to consider the effect of the savings clause,[12] an issue that was neither addressed nor resolved by the majority in its opinion. (Opp.15-19.) Respondents' focus on the savings clause cannot diminish the significance of the Fifth Circuit's decision that the Assignment Statute neither "relates to" ERISA, nor conflicts with ERISA's exclusive civil enforcement scheme. As a result of this ruling, the statute is applicable to and enforceable against all ERISA plans, included self-funded and insured plans.[13] (Pet. App. 21a.) However, the majority expressly did not consider whether the Statute nevertheless would be saved from preemption as a law regulating insurance. (Pet. App. 21a.) Thus, the savings clause analysis is irrelevant to the pending Petition and not properly a subject for review by this Court. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) (it is not a sensible exercise of this Court's discretion to consider particular legal analysis without benefit of full record or lower court determination).[14]

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to that beneficiary. No beneficiary rights exist in the abstract; rather, the plan terms control beneficiary status. *See* Pet. 15 n. 18, citing *Cobb v. Cent. States*, 461 F.3d 632, 635 n.3 (5th Cir. 2006).

[12] ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

[13] The Fifth Circuit did not address the significance of the distinction between self-funded and insured plans for purposes of its ultimate preemption decision; *compare Prudential II,* 413 F.3d at 914 (statute saved from preemption except with regard to self-funded plans, but § 502 completely preempts statute's penalty provision with respect to any ERISA cause of action).

[14] If this Court grants the Petition, it may ultimately reverse and remand the Fifth Circuit's decision for further proceedings, at which time consideration of the savings clause issue would be appropriate. Petitioner then would demonstrate that the Assignment Statute is not saved from preemption under *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), because (1) it is not specifically directed toward insurance entities; *see, e.g., Levine v. United Healthcare Corp.*, 402 F.3d 156, 166

C. The Assignment Statute conflicts with ERISA's exclusive civil enforcement scheme

ERISA's "extraordinary preemptive power" requires preemption of "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy," even if – as Respondents vehemently (albeit prematurely) urge – the state law would otherwise be saved from preemption as a law regulating insurance. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209, 217 (2004). Pet. 20-25. By expressly establishing a state cause of action "to collect benefits" and an extra-contractual remedy for providers, the Assignment Statute conflicts with ERISA's exclusive enforcement scheme.

Respondents assert that *Davila*, and Petitioner's analysis of same, "add[] nothing," (Opp. 8) and "[are] a purposeless sideshow" (Opp. 19). Yet the Assignment Statute's conflict with ERISA §502(a)(1)(B) is far from a sideshow. In ERISA §502(a)(1)(B), Congress provided the exclusive mechanism under which an action for ERISA plan benefits may be maintained, and the only available remedy

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(3d Cir. 2005) (statute not specifically directed toward insurance industry where it governed all civil actions, not merely those against insurers, and explicitly regulates both insurance and non-insurance entities; significant impact on insurance industry is not sufficient); and (2) it does not substantially affect the risk pooling arrangement between the insurer and the insured because it does not alter the bargain between the participant and the insurer, govern whether Blue Cross must cover a claim, or dictate to Blue Cross the conditions under which it must pay the claim; *see, e.g., Ellis v. Liberty Life Assur. Co.*, 394 F.3d 262, 277 (5th Cir. 2004) (remedial statute does not affect risk pooling because it does not affect initial bargain insurer makes with insured regarding coverage for disability); *cf., Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir.) (statute that addresses *who pays* in given circumstances is directed at spreading risk), *cert. denied*, 540 U.S. 1073 (2003).

thereunder is the payment of benefits in the manner specified under the plan. The state is trying to rewrite ERISA by creating a cause of action under the Assignment Statute to "collect benefits," and by providing for an extra-contractual remedy, *i.e.,* a payment to a provider contrary to the plan terms.

ERISA's expansive preemption provisions are intended to ensure that regulation of ERISA plans and enforcement of their terms are "exclusively a federal concern." *Davila*, 542 U.S. at 208. The Assignment Statute conflicts directly with that intent, and therefore must be preempted. *See, e.g., Hutchison v. Fifth Third Bancorp*, 469 F.3d 583, 588 (6th Cir. 2006) (*Davila* requires preemption of state law claim relating to plan amendment that changed definition of beneficiaries because it "goes to the heart of what Congress intended ERISA to govern: the rights of beneficiaries under ERISA against plan administrators.... As long as ERISA exclusively regulates the activity..., ERISA prevents the distinct state law ... scheme from superimposing an extra layer of regulation on top of the ERISA-regulated plan benefit determination.")

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, the petition for a writ of certiorari should be granted.

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